STATE OF MICHIGAN

IN THE SUPREME COURT

ESTATE OF BETTY JEAN SHINHOLSTER, Deceased, by **JOHNNIE E. SHINHOLSTER,** Personal Representative,

Plaintiff-Appellee

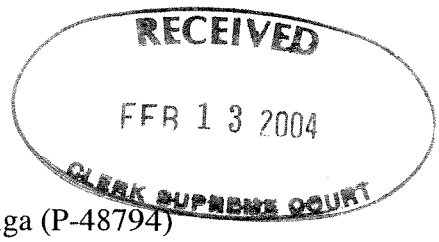
v.

ANNAPOLIS HOSPITAL, assumed name for **OAKWOOD UNITED HOSPITALS, INC.**, a Michigan Corporation; **ESTATE OF DENNIS E. ADAMS, M.D.**, Deceased, by **KATHERINE ADAMS**, Personal Representative, and **MARY ELLEN FLAHERTY, M.D.**,

Defendants-Appellants.
/

Supreme Court
No. 123720
123721
Court of Appeals
No. 225710
225736

Wayne County Circuit Court
No. 97-709041-NH



Judith A. Susskind (P-40700)
The Thurswell Law Firm
Attorneys for Plaintiff-Appellee
1000 Town Center, Suite 500
Southfield, MI 48075
(248) 948-0000

Michael D. Dolenga (P-48794)
Dolenga & Dolenga, PLLC
Attorneys for Defendant-Appellant Annapolis Hospital (Court of Appeals No. 225710, Consolidated)
30850 Telegraph Rd., Suite 250
Bingham Farms, MI 48024
(248) 988-9922

Mark Granzotto (P-31492)
Granzotto & Nicita, P.C.
Co-Counsel for Plaintiff-Appellee
1500 Buhl Building
Detroit, MI 48226
(313) 964-4720

Graham K. Crabtree (P-31590)
Fraser Trebilcock Davis & Dunlap, P.C.
Attorneys for Defendants-Appellants Mary Ellen Flaherty, M.D. and Katherine Adams, Personal Representative of the Estate of Dennis E. Adams, M.D., Deceased
1000 Michigan National Tower
Lansing, MI 48933
(517) 482-5800

AMICUS CURIAE BRIEF OF FORD MOTOR COMPANY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUE ADDRESSED BY AMICUS CURIAE BRIEF

Did the Court of Appeals err in holding that a plaintiff's or decedent's pretreatment negligence in a medical malpractice action, even if it is a proximate cause of the plaintiff's damages, must be excluded from the jury's consideration in allocating fault under Michigan's comparative fault statute, MCL 600.6304?

The Court of Appeals said "no."

Amicus Curiae Ford Motor Company says "yes."

I. THE COMPARATIVE FAULT STATUTE IS PLAIN AND UNAMBIGUOUS AND REQUIRES A COMPARISON OF ALL FAULT IN ALL TORT CASES THAT IS A PROXIMATE CAUSE OF THE INJURY.

A. The Court Of Appeals Was Required To Apply The Statute As Written And The Statute Contains No Exception For A Plaintiff's Pretreatment Negligence In Medical Malpractice Cases.

This Court has repeatedly held that the courts of this State are required to apply unambiguous statutes as written and cannot create exceptions or rewrite statutes simply because the court believes some other rule would be more fair or constitute better policy. *Robinson v. Wade,* 462 Mich 439, 459, 613 NW2d 307, 318 (2000)("Where the language of a statute is clear and unambiguous, the Court must follow it." A court has "no authority" to "contradict the statute's clear terms.") The comparative fault statute, MCL 600.6304, is plain and unambiguous. It requires a comparison of all fault in all tort cases, including medical malpractice actions, as long as the fault is a proximate cause of the injury and damages for which the plaintiff is suing:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court . . . shall instruct the jury to answer special interrogatories . . . indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury including each plaintiff . . .

* * *

(8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct . . . that is a proximate cause of damages sustained by a party.

MCL 600.6304. *Lamp v. Reynolds,* 249 Mich App 591, 602-03, 645 NW2d 311, 318 (2002)("[T]he application of the comparative fault statutes in Michigan does not depend on the type of at-fault conduct of either a plaintiff or a defendant. Instead, the comparative fault statutes are operative against each person, including a plaintiff, whose conduct is found to be a proximate cause of the plaintiff's damages.")[1]

Not only is there no statutory exception for a plaintiff's negligence in medical malpractice cases, but the statute establishes special provisions for

[1] As explained in its motion for leave to file this amicus brief, Ford has a great interest in the consistent application of comparative fault. Ford is frequently sued under the "crashworthiness" theory to recover damages for injuries suffered in motor vehicle accidents caused by the negligence of the plaintiff or other drivers. The negligence of the plaintiff or third parties in causing the accident is at least a concurrent proximate cause of the injuries in such cases. *Zalut v. Andersen & Associates, Inc.*, 186 Mich App 229, 236-37, 463 NW2d 236, 240 (1990). Nevertheless, a small minority of courts in other jurisdictions have adopted reasoning similar to that of the Court of Appeals in this case to exclude the fault of the plaintiffs, and even third parties, from the comparative fault analysis in crashworthiness cases. Although Michigan has rejected that particular result, decisions such as the one in this case undermine the consistent application of comparative fault.

payment of the judgment in a medical malpractice action depending on whether the plaintiff is found to be "without fault" or "to have fault." MCL 600.6304(6)(a) and (b). Nothing in those provisions creates any exception to the operation of the statutory scheme depending on whether the plaintiff's causal fault occurs before seeking treatment or after.

The only limitation on the comparison of fault under the statute is that each act, omission, or conduct constituting fault must be a proximate cause of the damages for which the plaintiff is suing. MCL 600.6304(8). *Lamp, supra,* 249 Mich App at 603 ("[T]he comparative fault statutes accomplish this [fair apportionment of damages] by disavowing labels that distinguish types of at-fault conduct in favor of a more accurate measure for determining apportionment liability – proximate cause.") Thus, unless a court properly holds that particular conduct was not a proximate cause of the injury *as a matter of law,* the court has no discretion or authority to exclude that conduct from the jury's allocation of fault.

In this case, the Court of Appeals did not hold that the plaintiff's pretreatment negligence was not a proximate cause of her death as a matter of law. Although the Court suggested that such a position "could potentially be argued" (Slip Opinion, p. 5, fn. 5), it stopped well short of making such a ruling. On the contrary, the Court's opinion appears to assume that her pretreatment negligence was, or could be found by a jury to be, a proximate cause of her death. (Slip

Opinion, p. 5). Furthermore, the Court of Appeals appeared to recognize that the plain language of the statute requires an allocation of fault to the decedent if the jury found, as it could, that her pretreatment negligence was a cause in fact of her fatal stroke:

> There is some appeal to defendants' claim that under the 1995 tort reform legislation, any fault on the part of a plaintiff (or, in this case, the decedent) should be apportioned. Indeed, MCL 600.6304(1)(b) indicates that a jury shall make findings with respect to "[t]he percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff . . . ." Clearly, a person who does not follow her doctor's orders and who therefore maintains a high blood pressure is contributing to her own death.

(Slip Opinion, p. 4-5).

That should have been the beginning and end of the Court's analysis. An unambiguous statute requires no interpretation and need only be enforced as written. *Robinson, supra.* However, the Court of Appeals then proceeded to create an exception to the statute based on the "persuasive rationale" of a few out-of-state cases, none of which were decided under Michigan's statute. (Slip Opinion, p. 5-6). It is noteworthy that, in adopting the rationale of these cases, the Court of Appeals never again mentions the statute and makes no attempt to reconcile its own policy decision with the statute adopted by the Legislature. (Slip Opinion, p. 5-6). Indeed, the Court of Appeals never even suggests that the statute is ambiguous.

Thus, it is clear that the Court of Appeals simply ignored the plain language of the statute and adopted a policy that it believed was better than the one adopted by the Legislature. This is clear and manifest error that has implications not only to the enforcement of the comparative fault statute but also to statutory law generally in Michigan. This Court should reverse this holding and confirm that all causal fault must be considered and allocated by the finder of fact in all tort actions.

B. Negligence By A Plaintiff May Be A Proximate Cause Of The Plaintiff's Ultimate Injury Or Condition Despite Negligent Medical Treatment.

It is also plain that, under Michigan jurisprudence, a plaintiff's pretreatment negligence can be a proximate cause of the plaintiff's injuries in a medical malpractice action. Because it is possible for a plaintiff's pretreatment negligence to be a proximate cause of her own injuries, notwithstanding negligent medical treatment, the blanket rule adopted by the Court of Appeals excluding all pretreatment negligence from the operation of the comparative fault statute violates the plain language of the statute.

An act is a proximate cause of an injury if the injury was the natural and probable result of the act, even though other proximate causes concurred or contributed to produce that result. *Hagerman v. Gencorp Automotive,* 457 Mich 720, 729-33, 579 NW2d 347, 351-53 (1998). An act of negligence does not cease to be a proximate cause of the injury because of an intervening act of negligence if

such negligence is foreseeable, the prior negligence is still operating, and the injury is not different in kind from that which would have resulted from the prior act. *Taylor v. Wyeth Laboratories, Inc.,* 139 Mich App 389, 401-02, 362 NW2d 293, 300 (1984).

In the context of subsequent medical malpractice, it has long been held that negligent medical treatment of an injury is foreseeable and ordinarily is not a superseding cause that cuts off the causal contribution of the act that caused the injury:

> If a wound or other injury cause a disease, such as gangrene, empyema, erysipelas, pneumonia, or the like, from which deceased dies, he who inflicted the wound or other injury is responsible for the death. * * * He who inflicted the injury is liable even though the medical or surgical treatment which was the direct cause of the death was erroneous or unskillful, or although the death was due to the negligence or failure by the deceased to procure treatment or take proper care of the wound.

People v. Townsend, 214 Mich 267, 279, 183 NW2d 177,181 (1921). Accord, *People v. Bailey,* 451 Mich 657, 549 NW2d 325 (1998); *Martin v. Ford Motor Company,* 401 Mich 607, 619, 258 NW2d 465, 470 (1977)("It would be an undue compliment to the medical profession to say that bad surgery is no part of the risk of a broken leg."); *People v. Flenon*, 42 Mich App 457, 461-62, 202 NW2d 471, 474 (1972)("The concept of intervening cause is predicated upon foreseeability. Since humans are not infallible, a doctor's negligence is foreseeable . . . ")

In this case, if defendants presented evidence that but for the decedent's failure to take her high blood pressure medicine she probably would not have suffered a fatal stroke, then her negligence was a proximate cause of her death. The fact that the defendants may have negligently treated her was not a superseding cause of her death because it was foreseeable and did not produce an injury different in kind, or wholly disconnected from, the natural consequences of decedent's own negligence. The most that can be said of the defendants' medical treatment is that it failed to *prevent* decedent's negligence, and perhaps other contributing factors, from resulting in her death. *People v. Townsend,* 214 Mich at 279 ("The [negligent medical] treatment did not cause blood poisoning; the wounds did that, and the most that can be said about the treatment is that it did not prevent blood poisoning but might have done so had it been different.")

In these circumstances, the decedent's failure to take her blood pressure medicine and the defendants' allegedly negligent medical treatment were *both* proximate causes of her death. This is precisely the situation in which the jury is required to allocate fault between the *multiple* parties at fault under Michigan's comparative fault statute.[2]

---

[2] This result is not surprising. Because the law of proximate cause is the same regardless of who is at fault, *Lamp, supra,* 249 Mich App at 600, fn. 5, a rule that negligent medical treatment automatically cuts off a plaintiff's responsibility for her conduct also would absolve negligent third parties and even persons guilty of criminal acts from responsibility for the natural and foreseeable consequences of their actions. The law has long rejected such a result. *See, Townsend, supra; Bailey, supra.*

Although the Court of Appeals appeared to recognize that the jury could have found that plaintiff's pretreatment negligence was a proximate cause of her death, it nevertheless sought to minimize her responsibility by characterizing her conduct as merely "creating the condition that led [her] to seek treatment." (Slip Opinion, pp. 5-6). This is a mischaracterization of the causal contribution of the decedent's negligence in this case, and of a plaintiff's pretreatment negligence in many medical malpractice actions. If the decedent's failure to take her blood pressure medicine was a cause in fact of her fatal stroke, then decedent did more than "create the condition that led her to seek treatment." Rather, her negligence was a direct, contributing cause of her death that was operative at the moment of her death.

It is certainly possible to hypothesize situations in which a plaintiff's pretreatment negligence actually does no more than "create the condition that led [him or her] to seek treatment." Typically, in those situations, the intervening negligence of a treating physician could be found to be a superseding cause because it produces an injury that is "different in kind" and is not the natural and probable result of the plaintiff's original negligence.

For example, if a person negligently broke her leg and during surgery to set the leg a doctor negligently cuts an artery causing her to bleed to death, the decedent's original negligence could be said to have done no more than bring her to

the operating table. In that situation, a court might hold or a jury might find, applying ordinary principles of superseding cause, that the doctor's negligence was a superseding cause of her death.[3] If the court reached that conclusion, an allocation of fault to the decedent would be precluded because of the absence of proximate cause, not because the decedent's negligence preceded her seeking treatment for the broken leg.

As the Court of Appeals appeared to recognize, there are many situations, like the one in this case, where a plaintiff's pretreatment negligence could be found to be a proximate cause of her ultimate injury or condition notwithstanding negligent medical treatment of that condition. (See, Slip Opinion, p. 6, recognizing "the preventable nature of many illnesses . . . "). That should have led the Court to apply the comparative fault statute as written to those situations, rather than engraft a judge-made exception to the statute to absolve negligent plaintiffs of *all* responsibility for their own negligence.

II. THE COURT OF APPEALS DECISION AND THE CASES ON WHICH IT RELIED ARE POORLY REASONED AND INAPPLICABLE TO MICHIGAN'S COMPARATIVE FAULT STATUTE.

[3] Of course, this typically would not be the case if the surgeon only negligently set the broken leg. Such an injury would be part of the natural and foreseeable result of the plaintiff's original negligence.

A. The Court Of Appeals Decision Is Illogical And Reflects Bad Policy Directly At Odds With The Legislature's Adoption Of Comparative Fault.

Although the reasons for the Court of Appeals decision are irrelevant given the plain language of the comparative fault statute, the "persuasive rationale" that it used to justify overriding the statute is actually not persuasive at all and grossly misstates the effect of applying comparative fault. The Court of Appeals reasoned, along with the out-of-state cases that it cited, that a person who negligently injures themselves "are nevertheless entitled to subsequent non-negligent medical treatment" and that allowing comparative fault to be applied to that person's pretreatment negligence "would allow many health care professionals to escape liability for negligently treating ill patients." (Slip Opinion, pp. 5, 6).

This "persuasive rationale" makes absolutely no sense under Michigan's comparative fault statute. Applying comparative fault does not eliminate anyone's duty to act non-negligently nor does it allow anyone to "escape liability" for their own negligence. Rather, it allocates liability among *all* persons who breached a duty of care or were otherwise at fault and who proximately caused the injury. Indeed, the whole purpose of comparative fault is to make sure that *no one* escapes responsibility for the consequences of their negligent conduct – plaintiffs or defendants:

> The doctrine of pure comparative negligence does not allow one at fault to recover for one's own fault, because damages are

> reduced in proportion to the contribution of that person's negligence, whatever that proportion is. The wrongdoer does not recover to the extent of his fault, but only to the extent of the fault of others . . . . What pure comparative negligence does is hold a person fully responsible for his or her acts and to the full extent to which they cause injury. That is justice.

Placek v. City of Sterling Heights, 405 Mich 638, 661, 275 NW2d 511, 519 (1979). That purpose is no less applicable to multiple causes in medical malpractice actions than to multiple causes in any other tort action.

The Court of Appeals rationale, if applied consistently, would override the statute and eliminate comparative fault in every tort action. In every situation in which a negligent plaintiff has contributed to her own injury, she is still entitled to non-negligent conduct by the defendant. In *Placek* itself, for example, the defendant, the driver of an emergency vehicle responding to an emergency, was required by statute to "drive with due regard for the safety of all persons using the highway" and to proceed through a stop sign "only after slowing down as may be necessary for safe operation." The plaintiff in *Placek*, while perhaps negligent herself in proceeding through the stop sign, "nevertheless was entitled to subsequent non-negligent" driving by the defendant in compliance with the statute. Indeed, in all negligence cases, it is the defendant's duty to act non-negligently that is the basis for holding the defendant liable at all. Thus, if the existence of that duty

is a reason to jettison comparative fault, it would have to be jettisoned in every tort action.

Similarly, if the mere application of comparative fault allowed a negligent defendant to "escape liability" it would have that effect in every tort action. But it does not. On the contrary, it only reduces the plaintiff's recoverable damages in proportion to the plaintiff's own fault. The Court of Appeals' hyperbolic mischaracterization of the effect of comparative fault cannot justify a different rule for some tort actions than for others.

The Court of Appeals opinion also asserted that a different rule should apply to a plaintiff's pretreatment negligence in a medical malpractice action because such negligence only "creates the condition that led [the plaintiff] to seek treatment" and that it would be "unfair" to allow a treating physician to "complain of the plaintiff's pre-presentment negligence" that caused the "very condition" that the doctor undertook to treat. (Slip Opinion, p. 5, citing Restatement (Third) of Torts, Apportionment, §7, comment m). Besides having no basis in the comparative fault statute, this premise does not justify the special rule adopted by the Court of Appeals.

First, as discussed above, except in situations where the plaintiff's pretreatment negligence is not a proximate cause of the ultimate injury as a matter of law, the Court of Appeals mischaracterizes the plaintiff's causal contribution to

her injury. In this case, as in many medical malpractice cases, the decedent's pretreatment negligence was a concurrent, active, and direct cause of the ultimate injury for which the plaintiff seeks damages. It did not merely create the condition that required medical treatment.

Second, this Court has rejected the argument that when the defendant's negligence is premised on a duty to protect the plaintiff from her own conduct, the plaintiff's fault should not be considered at all in the allocation of fault. In *Hickey v. Zezulka,* 439 Mich 408, 487 NW2d 106 (1992) the custodial defendant had a duty to protect the plaintiff from his own intentional acts and negligently breached that duty. Nevertheless, this Court held that, under pure comparative fault, the jury should consider the plaintiff's own conduct in allocating fault:

> Where . . . the defendant assumes a duty to protect the plaintiff from that injury . . . I agree that the plaintiff should not lose his cause of action. I disagree, however, that the other extreme should be adopted – that the defendant then assumes all responsibility, and liability, for injuries that the plaintiff intentionally commits upon himself. The assumption of a duty to protect the decedent while in defendant's custody merely establishes a legal basis for holding the defendant negligent. The mere existence of a duty does not automatically lead to the conclusion that the decedent's fault should not be considered.

439 Mich at 448. This Court held that a jury is capable of properly considering the relative positions of the parties and the nature of the defendant's duty in fairly allocating fault. 439 Mich at 449-50. ("Comparison of 'qualitatively different' conduct . . . is not only possible, but is required by this Court's adoption of 'pure'

comparative fault.") This reasoning applies with equal force to the physician's duty to treat a condition caused by the negligent or intentional conduct of the plaintiff.

There is simply nothing unfair about the application of comparative fault in every tort action. As explained in *Placek,* the purpose of comparative fault – the very reason it was adopted – is to allow a jury to reach a "fair" result in *every* case of multiple causes in light of *all* of the relevant circumstances. The fact that a doctor undertook to treat an existing condition may be an important, and in many cases an overriding, factor in the jury's allocation of fault. There is no reason to believe that a reasonable jury will not give that circumstance as much weight and consideration as it deserves in the particular case.[4] But there are many other facts that might be relevant to an allocation of fault, such as evidence that the plaintiff's pretreatment conduct was grossly negligent or even intentional, whereas the doctor's negligence and causal contribution was slight.

There is no *a priori* reason that one circumstance in a medical malpractice action – the doctor's undertaking to treat a condition caused by the plaintiff's negligence – should trump every other circumstance in the case *as a matter of law* and automatically require an allocation of 100% of the fault to a treating physician. *See, Hickey, supra,* 439 Mich at 449 ("This goal [of a fair apportionment of

[4] Indeed, before even getting to the question of comparative fault, the jury might find that the plaintiff's pretreatment negligence was not a cause in fact of the ultimate injury or that negligent medical treatment was a superseding cause. When reasonable people could disagree on these issues, they are issues of fact for the jury to decide. *Taylor v. Wyeth Laboratories, supra.*

damages] is not served; rather, it is thwarted when a slightly negligent defendant is held liable for one hundred percent of the damages caused principally by the wrongful intentional conduct of a plaintiff.") The fact that a reasonable jury might allocate some fault to the negligent plaintiff in some medical malpractice cases demonstrates the arbitrariness of the rule adopted by the Court of Appeals.

It was to eliminate such arbitrary results that contributory negligence was abandoned and comparative fault adopted. See, *Lamp, supra,* 249 Mich App at 603-04 ("The clear import of this design is that the [comparative fault] statutes cannot be implemented by a bright-line rule but, instead, their application is as individualized as the circumstances giving rise to a cause of action.") Creating special rules for some tort cases that eliminate the jury's ability to achieve a just result in each case is a step backwards. It is not the application of comparative fault, but the exception to comparative fault adopted by the Court of Appeals that inevitably will cause unfairness in some cases.

B. The Authorities Cited By the Court Of Appeals Are Not Applicable Under Michigan's Comparative Fault Statute.

The Court of Appeals cited four non-Michigan cases and comments to the Restatement (Third) of Torts in support of its holding. None of these authorities were decided under Michigan's comparative fault statute. Two of the cases were decided under the common law of their particular states. See, *Rowe v. Sisters of*

Pallotine Missionary Society, 211 W. Va. 16; 560 SE2d 491 (2001); *Harding v. Deiss,* 300 Mont. 312; 3 P.3d 1286 (2000). In another case, a federal district court acknowledged the existence of a Maine statute, but never analyzes the statute and decides the issue as if it is deciding (or adopting) state common law. *Harvey v. Mid-Coast Hospital,* 36 F. Supp. 2d 32 (D. Maine 1999). The fourth case did not involve comparative fault at all and merely held that the jury should have been instructed not to consider the cause of an automobile wreck in deciding a claim for medical malpractice. *Martin v. Reed,* 200 Ga. App. 775; 409 SE2d 874 (1991). The only relevant language from that decision is *dicta.*

These cases have nothing to say about the proper application of the plain language of Michigan's comparative fault statute. Moreover, they are based on the fallacious premise that a plaintiff's pretreatment negligence merely "provides the occasion for medical attention, care or treatment", *Harvey,* 36 F. Supp. 2d at 35; or that medical malpractice is always a superseding cause of the plaintiff's injury. *Harding,* 3 P.3d at 1289. As shown above, this reasoning is factually inaccurate and inconsistent with Michigan principles of proximate and superseding cause.

Significantly, none of these authorities actually applied principles of proximate cause to the plaintiff's pretreatment negligence; they simply announced

a special rule to govern such cases.[5] The Michigan comparative fault statute, however, requires the application of proximate cause principles in determining what conduct will be considered in allocating fault. *Lamp, supra.*

The cited authorities, like the Court of Appeals, also confuse the old doctrine of contributory negligence, under which the plaintiff's claim would be barred by her negligence, with comparative fault, under which the plaintiff's negligence merely reduces her recoverable damages. See, *Harding,* 3 P.3d at 1289, citing contributory negligence cases and stating, "[u]nder [comparative fault], in any case where the patient was responsible for events that led to her hospitalization, the treating physician would not be liable for negligent treatment." This is simply a misstatement of the law.

It is particularly ironic that these cases and the Court of Appeals rely on a rationale that would be applicable only under the old doctrine of contributory negligence, given that comparative fault was adopted specifically to eliminate the

---

[5] The facts of the cited cases reveal the illogic of both their reasoning and their results. For example, in *Harvey* the plaintiff's son intentionally took an overdose of drugs in a suicide attempt that resulted in serious brain damage. Yet the court held that his conduct only "created the occasion" for medical treatment even though the drugs that he ingested were the direct, active cause of his brain damage. Similarly, in *Harding*, the plaintiff's teenage daughter knew that she was asthmatic and allergic to horses, but she went horseback riding anyway and developed such difficulty breathing that she collapsed and, according to the defendant's evidence, suffered severe oxygen deprivation and brain damage before she ever saw a doctor. Nevertheless, the court held that her negligence in going horseback riding "merely furnish[ed] the need for care and treatment" – as if it did not actually contribute to her injury. There is nothing fair or equitable about these results. The relative fault of the decedents and of their treating physicians should have been determined by the juries hearing those cases.

unfairness of contributory negligence. Having eliminated the unfairness of contributory negligence, these courts would swing the pendulum to the other extreme by eliminating *any* consideration of the plaintiff's negligence even to reduce her damages. See, *Hickey, supra,* 439 Mich at 448 (rejecting "the other extreme" of relieving the plaintiff of all responsibility.) This is neither fair nor logical and cannot be reconciled with Michigan's comparative fault statute.

CONCLUSION

The Court of Appeals opinion substitutes its policy judgment for that of the legislature and violates Michigan law. Moreover, the policy judgment made by the Court of Appeals is poorly reasoned and wrong. Accordingly, this Court should reverse the Court of Appeals opinion on the proper application of comparative fault in this case.

Respectfully submitted,

By: 

Robert W. Powell (P34127)
Office of the General Counsel
Ford Motor Company
Suite 300
Parklane Towers West
3 Parklane Boulevard
Dearborn, MI 48126-2568
(313) 621-6402

Dated: February 6, 2004